

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MAURICE HANEY,

Defendant-Appellant.

UNPUBLISHED

April 25, 1997

No. 190161

Macomb Circuit

LC No. 94-002349

Before: Wahls, P.J., and Gage and W.J. Nykamp,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to twelve to twenty years' imprisonment. We affirm.

Defendant first argues that he was effectively denied his right of appeal because several pages of the transcript indicate that the testifying witness's voice was inaudible. We disagree. We find this issue unpreserved because defendant did not attempt to settle the record below, but we will review the issue for plain error because it involves defendant's right of appeal guaranteed by our state constitution. Const 1963, art 1, § 20; *People v Grant*, 445 Mich 535, 547, 553; 520 NW2d 123 (1994).

Our state's courts have held that the inability to obtain the transcripts of criminal proceedings may so impede a defendant's right of appeal that a new trial must be ordered. *People v Frechette*, 380 Mich 64, 73; 155 NW2d 830 (1968); *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981). However, this is not a case where the transcripts were unavailable. There are several pages within the transcript that indicate that the witness's voice was inaudible because the witness was not near the microphone. Our review of the record indicates that the inaudible portions of the transcript are at most random words or phrases. There are not missing paragraphs of testimony as defendant would have us believe. In addition, there are no objections on the record below, except one which was sustained in defendant's favor, in any of the areas where inaudible transcript is indicated. Therefore, any claim of error based upon the inaudible portions of the transcript would be unpreserved

* Circuit judge, sitting on the Court of Appeals by assignment.

for our review. We do not find it necessary to remand this case for settlement of the record because the record is complete to the extent that defendant may discern all appealable issues from the transcript provided. We do not think that defendant has been denied his constitutional right of appeal.

Defendant next argues that the trial court erred when it admitted evidence of his two prior retail fraud convictions to impeach his testimony. We disagree. The decision to allow impeachment with prior convictions rests within the sound discretion of the trial court. That decision will not be reversed on appeal absent an abuse of that discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). We will find an abuse of discretion only if an unbiased person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

MRE 609(a)(2) provides that a witness's credibility may be impeached through the use of prior convictions of crimes that contain an element of theft and are punishable by imprisonment in excess of one year if the trial court determines that the evidence has significant probative value on the issue of credibility, and, if the witness is a criminal defendant, the court further determines the probative value of the evidence outweighs the prejudicial effect. *People v Allen*, 429 Mich 558, 605-606; 429 NW2d 499 (1988). Retail fraud is a theft crime, and first-degree retail fraud is punishable by more than one year of imprisonment. MCL 750.356c; MSA 28.588(3). Thus, it was within the trial court's discretion to determine the admissibility of the convictions by examining the degree of probativeness and prejudice inherent in their admission. *Id.* at 606. In making this determination, the trial court should consider the vintage of the prior convictions and the degree to which the crimes were indicative of veracity on the probative side of the equation. *Id.* Defendant's retail fraud convictions were only two years old. Such recentness increases the probative nature of the convictions. *Id.* at 611. On the prejudice side, we must consider the similarity of the offenses and the importance of defendant's testimony to the decisional process. *Id.* at 606. Retail fraud and armed robbery share common elements of theft of property. This similarity lends to the prejudicial effect of the prior convictions. *Id.* at 611. However, retail fraud, unlike armed robbery, is not an assaultive crime. Moreover, the admission of the prior convictions did not dissuade defendant from exercising his constitutional right to testify on his own behalf. Balancing the above considerations, we find that the trial court did not abuse its discretion when it admitted evidence of defendant's two prior retail fraud convictions.

We note that defendant also complains that the trial court did not articulate on the record its reasons for admitting the prior convictions evidence as required by MRE 609(b). We agree. However, we find the trial court's error to be harmless in light of our analysis. *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1992).

Defendant's final argument is that the evidence was insufficient to sustain his conviction of armed robbery. We disagree. In determining a claim of insufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether the evidence was sufficient to support a conclusion by the trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992). The essential elements of the crime of armed robbery are (1) an assault and (2) a felonious taking of property from the victim's

person or presence while (3) the defendant is armed with a weapon described in the statute. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1991). Armed robbery is a specific intent crime for which the prosecutor must establish that the defendant intended to permanently deprive the owner of property. *Id.*

Our review of the record reveals that defendant entered the party store with a small, empty duffel bag. The store clerk saw defendant crouched on his knees near the cigarette shelves, making motions like he was taking items from the shelves. Two customers reported that someone was putting cigarettes into a bag. When the store clerk asked defendant to open his duffel bag, defendant refused and displayed a knife. After defendant left the store, the clerk noticed that there were eight to ten cartons of cigarettes missing from the shelves near where defendant was seen crouched on his knees. We think this evidence was sufficient to justify a finding that defendant stole cigarettes from the store. To the extent that defendant argues that he did not pull out his knife until after the cigarettes were in his duffel bag and therefore the prosecutor did not prove the elements of force or that defendant was armed, this argument has no merit. Robbery is a continuous offense that is not complete until the perpetrator reaches a place of temporary safety. *People v Newcomb*, 190 Mich App 424, 431; 476 NW2d 749 (1991). The fact that defendant displayed a knife is sufficient to supply the element of force or coercion essential to the offense of armed robbery. See *People v Tinsley*, 176 Mich App 119, 121-122; 439 NW2d 313 (1989).

Defendant also claims that there was no evidence that he possessed a larcenous intent at the time of the taking. Questions of intent should be left to the trier of fact to resolve. *People v McBride*, 204 Mich App 678, 682; 516 NW2d 148 (1994). A rational trier of fact could infer from the above evidence that defendant intended to permanently deprive the party store of the cigarettes. Accordingly, we will not interfere with the jury's resolution of this issue.

Affirmed.

/s/ Myron H. Wahls
/s/ Hilda R. Gage
/s/ Wesley J. Nykamp